

Section 4: Defenders

Defenders

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The U.S. criminal justice system relies on three important actors: the prosecutor, defender and trier of fact. The prosecutor and the defense counsel advocate for their clients. The prosecutor represents the government, and the defense attorney represents the person who is accused of a crime – the defendant. Ideally, equal financial resources support each advocate. A third actor, the fact-finder or judge, operates as a neutral party who weighs information presented by the advocates, and determines a just result. Of course, the system works best when the advocacy is equally competent on both sides, and when the fact-finder is fair.

Because of the seriousness of criminal charges, defendants need strong advocacy. The law allows defendants to act as their own trial advocates, or to hire a private attorney. Defendants may also apply to be represented by a public defender if they cannot afford to hire an attorney. (Public defenders are attorneys who are paid by the county, municipality, or state.) The American Bar Association (ABA), a national association of attorneys, states in its standards that attorneys should be provided to defendants as soon as possible after they are arrested, including bail hearings (American Bar Association 1998). Defense attorneys protect the defendant's rights by investigating the charges against them, appearing with the defendant at preliminary hearings, working out a plea bargain, or presenting a case at trial. They may also represent the defendant on appeal.

The U.S. and Washington State constitutions grant all criminal defendants the right to representation by a qualified attorney, even if the defendant cannot afford to pay one. All people charged with a felony, misdemeanor, juvenile offense, capital offense or probation violation may apply for a public defender at county or city expense. People facing civil commitment, sex offender commitment, or dependency proceedings, and children facing contempt of court in truancy proceedings, are entitled to public defenders as well.

Defendants are qualified to be represented by a public defender if they are 1) receiving public assistance, 2) involuntarily committed to a public mental health facility, 3) have an annual income of 125 percent or less of the current federal poverty level, or 4) are unable to pay the anticipated cost of counsel because they have insufficient funds (This last group may be required to pay a portion of the defense costs when able (RCW 10.101). Screeners determine the income of a defendant and recommend appointment of a public defender at the trial level. In some of Washington's larger counties, full-time screeners take applications from defendants and make recommendations to judges, who refer to these reports when the defendant first appears in court. In other counties, a judge screens the defendant. In Washington, publicly funded attorneys, appointed at the superior court level, represent between 85 and 90 percent of defendants (Washington State Office of Public Defense 2001 3).

Some cities and counties have defenders working in local government agencies. Others contract with non-profit defender organizations. Most cities or counties use either a rotating appointment system with private practice attorneys (assigned counsel) or contract with for-profit firms.

All criminal defendants found guilty at trial may appeal their convictions with attorneys provided by the state, regardless of the defendant's ability to pay. Indigency is, however, still a statutory prerequisite. While superior court judges have the authority to appoint appellate public defenders, most appoint attorneys who have been pre-qualified by the Washington State Office of Public Defense, which also pays for appellate public defense services. Most convicted defendants, particularly those in prison, cannot afford the high costs related to an appeal. While all persons have the right to appeal only those who are indigent are provided attorneys by the state.

Parties also may appeal an order of dependency action or termination, criminal contempt convictions and involuntary civil commitments. Washington's Office of Public Defense reports that funds provided court-appointed attorneys to about 88 percent of defendants in criminal and juvenile appeals in 1999 (Washington State Office of Public Defense 2001 3).

In 1989, the Washington State Legislature passed a law requiring that each local government adopt public defense standards to ensure adequate representation for all defendants. The Washington Defender Association (WDA), a non-profit organization that represents public defenders and assigned counsel across Washington, amended and updated the model standards they had developed in 1984. The Washington State Bar Association (WSBA) endorsed the updated standards in January 1990. When implemented, these standards helped to ensure that all defendants have effective counsel, regardless of the county where they are tried.

WDA addressed caseload levels, which are a significant predictor of the quality of public defense. Defense counsel carrying high caseloads cannot provide timely, effective assistance. ABA standards require that defense counsel must not carry a caseload that is so large it interferes with a proper representation of the client, or endangers the client (American Bar Association 1992 4-1.3). Full-time public defense attorneys, according to WDA standards, should not carry more than 150 felonies or 300 misdemeanors per year (1989 9-10). Based on a national standard of 1,650 billable hours per attorney, per year (Washington Defender Association 1989 12), this works out to attorneys spending just 11 hours on each felony or roughly five hours on each misdemeanor (Washington Defender Association 1989 12).

High public defender caseloads have been recognized as a problem by the Washington State Court of Appeals. In 1993, the Court of Appeals found that public defenders were working at caseload levels higher than those accepted by the WSBA, and so could legally withdraw from accepting more assigned cases, a precedent applicable to all of Washington (City of Mount Vernon vs. Weston, 68 Wash. App. 411 (1993)).

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resources, and lack the experience and training needed for the cases in which they are assigned. Counties have differing defense systems that lack oversight mechanisms and many have not adopted defense standards. Courts across the state violate the right to counsel by neglecting to advise defendants of their rights, failing to offer interpreter services for non-English speaking persons, and by allowing prosecutors to negotiate directly with non-represented defendants. These barriers most often result in the defendant facing imprisonment after a guilty plea made without counsel. And, often the defendant is unaware of his right to an attorney (Boruchowitz, 2004).

Trial Level Defenders

Counties fund trial attorneys for criminal defendants who cannot afford to hire an attorney in several ways. All methods can be effective, though each requires adequate funding and knowledgeable and experienced attorneys.

County-Based Public Defender – Currently six counties have salaried staff attorneys who provide criminal indigent defense services: Whatcom, Pierce, Spokane, Skagit, Thurston, and Yakima.

Non-Profit Corporations – Currently four counties contract directly with non-profit corporations to manage their public defense systems: King, Clallam, Jefferson, and Snohomish.

Private Firms - The majority of rural counties contract with individual defenders or private firms who handle all or a designated section of the criminal defense cases.

Assigned Counsel Panels - In this system, the court appoints attorneys from a list of private Bar Association members who accept cases on an individual basis. Only a few counties maintain these lists for primary assignment of counsel.

Appellate Representation

Appellate lawyers are paid between \$2,100 and \$2,300 per case.

Prior to 1995, Washington's Supreme Court and the Administrative Office of the Courts oversaw indigent defense services when cases that had been tried were appealed. (This is called the *appellate* level.) However, the Supreme Court determined that a growing backlog of cases and the need to prevent a conflict of interest in payment amount determination made this system unworkable. In 1995, the Appellate Indigent Defense Commission studied indigent defense systems in other states, and recommended the creation of the Office of Public Defense (OPD) to administer defense funds and work with appellate courts.

OPD now handles funding for all indigent defense appeals. Appellate lawyers are paid between \$2,100 and \$2,300 per case. Death penalty attorneys receive \$100 per hour. Attorneys can apply for additional compensation if a case is extraordinarily complex. During fiscal year 2002, OPD processed 13,030 invoices from court reporters, county clerks, appellate courts and attorneys, distributing \$3,832,271 for

attorney services and \$1,416,507 for other services (Washington State Office of Public Defense 2002d 3). Annually, the fees support approximately 1,600 newly filed cases (Ferguson May 20, 2003). To provide defense services in Division I of the Court of Appeals in Washington, OPD contracts with two competitively selected law firms. For Division II and III appeals, OPD contracts with over three- dozen individual defense attorneys.

Almost all death penalty defendants are indigent and require appointed counsel. OPD recommends the appointment of death penalty counsel to the Supreme Court from a list prepared by the Capital Counsel Panel. Court rules require that these attorneys be highly qualified and experienced. In December, 2000, OPD implemented a rotating process for death penalty counsel appointments in order to attain equal distribution of cases to qualified counsel. This process was used during 2002 to recommend counsel for two appellate level death penalty cases (Washington State Office of Public Defense 2002d 5).

Additional Public Defense Criminal Functions

Dependency/Termination Cases. Dependency cases are initiated when the state's Department of Social and Health Services (DSHS) files a petition in juvenile court alleging that a child is dependent (that is, the child is dependent on the state) because of child abuse and/or neglect, or because a parent is ill or otherwise unable to care for the child. In most cases, dependency is temporary, and children are returned to their families after a stay in foster care. If conditions in the child's family do not improve, however, DSHS may file a petition to terminate the parent-child relationship.

In both situations, the Attorney General's Office represents the state, and defense attorneys represent the parents. Parents qualify for appointed counsel in the vast majority of these cases; OPD reports the indigency rate in juvenile courts is about 95 percent (Washington State Office of Public Defense 2002 b 10). County governments fund these defense expenses, while the state covers the cost of prosecution (RCW 13.34). In 2002, 3,024 juvenile dependency proceedings and 1,434 terminations were filed across the state (Washington State Administrative Office of the Courts 2002 29).

In the largest counties, such as Pierce, King, and Spokane, staff public defenders represent the parents. More than one defense attorney is needed in many of these proceedings because RCW 13.34 allows separate counsel for each parent. At many dependency hearings, the parents have never been married to each other or are divorced, or they have significant conflicts of interest, such as allegations of violence in relation to the child; hence the need for individual representation. Defenders may also be appointed for children in dependency proceedings who are 12 and older.

Public Defense Civil Functions

Public Defenders also provide defendant support in civil cases:

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Sex Predator Commitment Cases - Washington has a law (RCW 71.09) that allows the state to hold certain sex offenders for mental health treatment after they have completed their prison terms. Under this law, roughly 3 percent of the approximately 1,000 sex offenders released from prison each year are sent to the Special Commitment Center located on McNeil Island.

Providing legal defense services for these cases is very time consuming. The state reimburses county governments for defense costs of attorneys and investigative staff at the relatively low rate of \$49.41 per attorney hour (WAC § 388-885-020), a figure unchanged since 1991. Therefore, counties must supplement state funds to find attorneys willing to take this work. The King County Prosecutor's office prosecutes commitment cases against individuals previously convicted in King County. In all other counties, the Attorney General's Office represents state interests at commitment hearings. After King County defenders requested more funding in a court hearing in January 2003, the state agreed to increase the funding to \$65 per hour, and this rate is included in the supplemental budget request this legislative session.

"Becca" Cases - These are civil cases in which public defenders represent juveniles in truancy or at-risk youth petitions, or Child In Need of Services cases. Attorneys advocate for the child, test information provided by the school district or the parents, and propose alternatives to incarceration if the child has violated a court order.

Office of Support Enforcement Cases - Parents in contempt proceedings for non-payment of child support are represented by public defenders.

Civil Commitment Cases - Public defenders represent clients who are facing civil commitment to mental health or treatment facilities for mental or alcohol/substance abuse disorders. Washington was a pioneer in developing fair hearings for people who in earlier years had been sent to mental hospitals for indefinite periods with little due process protections. Lawyers make sure the government can prove the allegations that a person is dangerous to himself or to others and needs to be hospitalized, and often can develop less restrictive alternatives to hospitalization which a judge adopts.

Federal Defenders

Federal attorneys represent defendants in federal criminal cases where individuals are unable to pay for adequate representation (18 U.S.C. §3006A). The defense attorneys are appointed by the federal District Court to advocate for individuals on indictment, information or complaint, violations of supervised release, probation or federal parole, witness representation, ancillary proceedings, post conviction actions and appeals to the United States Court of Appeals and Supreme Court. Two federal defender organizations represent indigent clients in Washington: the Defenders of Eastern Washington, located in Spokane and Yakima, and the Defenders of Western Washington, in Seattle and Tacoma.

Eighteen lawyers handle criminal cases in eastern Washington, each carrying an average load of 30 open cases at any one time. The office closes roughly 950 cases per year (Peven May 7, 2003). Not all of these

cases are in Washington, as the office also covers the District of Idaho and staffs a Capital Habeas Unit to provide federal habeas corpus representation²⁶ to death row inmates in Eastern Washington and Idaho.

Fifteen trial lawyers and four research lawyers try the federal defender cases in Western Washington. The office closes between 1700 and 1800 cases per year, and each lawyer averages about 120 cases annually. The relatively large number of misdemeanor cases from federal military bases in the western part of the state accounts for the disparity in numbers between the two sides of the state (Hillier May 19, 2003).

Support Organizations

Office of Public Defense - OPD is an independent judicial branch agency, created by the state legislature in 1996 “to implement the constitutional guarantee of counsel and to ensure the effective and efficient delivery of the indigent appellate services funded by the state” (RCW 2.70.005). OPD does not directly represent clients. A small staff administers state funds, develops administrative procedures, standards, and guidelines for appellate defense services, coordinates attorney services in the appellate courts, and initiates improvements in indigent defense in Washington.

Ongoing programs include:

Enhancement of the existing appellate representation system. Since 1999, OPD has been working with courts and attorneys to improve the quality of appellate representation through a competitive contract process. One such project is the development of a statewide appellate brief bank where attorneys are making available via the internet, copies of appellate briefs to enhance the available resources for attorneys.

Funding for Death Penalty Assistance. As directed by the Legislature, OPD developed a process to select and contract for the Death Penalty Assistance Center, a statewide resource for attorneys representing defendants faced with the death penalty.

Extraordinary Criminal Justice Costs Act. OPD, with assistance from the Washington Association of Sheriffs and Police Chiefs, is also responsible for administering the Extraordinary Criminal Justice Costs Act, which provides state reimbursement to counties experiencing high expenditures related to aggravated murder in any one year (RCW 43.330.190). The Legislature reimbursed two of the nine county applicants a total of \$394,000 for petitions submitted in 2001 (Washington State Office of Public Defense 2002c 1).

Dependency Representation Pilot Program. OPD began a pilot program in 2000 to provide enhanced services in Pierce and Benton-Franklin Juvenile Courts. The project provides funds to add attorneys and paralegals to the Pierce County Department of Assigned Counsel child

The National Council of Family and Juvenile Court Judges evaluated the program in 2003, finding a substantial increase in the rate of family reunifications in OPD program cases.

²⁶ Habeas corpus is a writ that directs those who have custody of the defendant to appear in court to determine if the prisoner is lawfully held in jail. It is protection against illegal confinement when the person’s due process rights are impaired, bail is excessive, etc. It can also be used procedurally in federal district courts to challenge the state’s lower court conviction.

dependency and termination of parental rights staff. In Benton-Franklin juvenile court, the project allowed the hiring of additional half-time attorneys, which reduced caseloads to 45 cases each. The National Council of Family and Juvenile Court Judges evaluated the program in 2003, finding a substantial increase in the rate of family reunifications in OPD program cases (Washington State Office of Public Defense 2002b 1). OPD received a legislative extension of project funding through 2005.

Implementation of Dependency and Termination Equal Justice Committee. At the direction of the 2001 Legislature, the OPD Advisory Committee established a new judicial branch committee to develop guidelines for a statewide child dependency and termination of parental rights defense representation program. The Committee is also examining problems in dependency and termination proceedings that obstruct equal justice for parents, and early permanent placements for children.

Washington Defender Association - WDA was formed in 1983 to provide support and training for public defenders. This group represents the organized defender offices in the state, and most of the assigned counsel and private firms providing public defense services. Some key statewide projects include:

Standards for Public Defense Service - In 1989, WDA updated model standards they had developed in 1984, to give public defenders objectives and minimum requirements to guide legal representation. The standards were endorsed by the Washington State Bar Association in 1990, and acknowledged by the state legislature that same year. RCW 10.101 now requires that each county or city, no matter how the entity provides public defender services, adopt the standards. The Washington Supreme Court in 2003 emphasized that local governments need to have standards. The Washington State Bar is working with WDA to revise the standards.

Byrne Grant Special Needs Project - Federal Byrne funds granted to the WDA provide two attorneys to advise, assist and train the public across the state on issues affecting defendants. For example, the immigration attorney educates defenders, prosecutors, and judges about ways to allow an abusive spouse to be sanctioned and receive treatment in the U.S., without affecting his or her immigration status. If the spouse is the primary wage-earner, his or her continued presence in the U.S. may be the best solution for the entire family. WDA has also chaired a cross-systems workgroup to address the needs of juvenile sex offenders unable to live at home. Its current focus is on collateral consequences and post-conviction relief.

Washington Juvenile Justice Assessment Project - WDA recently conducted a statewide assessment of indigent defense services for juveniles in Washington to evaluate the quality of juvenile defense counsel services. Among the findings, the researchers found that many counties have not adopted public defense standards, children are allowed to waive their rights to counsel, attorneys have extraordinarily high caseloads, attorneys lack specialized training, and there is statewide confusion about the role of the defender.

A juvenile justice assessment of indigent defense for juveniles found that many counties have not adopted public defense standards, children are allowed to waive their rights to counsel, attorneys have extraordinarily high caseloads, and attorneys lack specialized training.

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Some of the resulting recommendations include that children be provided adequate representation, that Washington law be changed to conform with national standards, counties enact standards of practice as required by law, attorneys receive training specific to juvenile representation, and limits be placed on caseloads. The full report can be accessed at:

<http://www.abanet.org/crimjust/juvjus/wareport/wareport.pdf>.

Washington State Office of Public Defense Dependency Project - WDA and OPD are collaborating on the child dependency and termination or parental rights project mentioned above. The project provides additional resources to county public defenders, whose clients are often disadvantaged by the fact that the defenders frequently face better-funded state attorneys general in dependency hearings.

Training - WDA provides approximately 100 hours annually of continuing legal education seminars on a variety of topics to attorneys across the state. Staff also maintain a website with a brief and expert bank, send out weekly e-mail updates, publish the DefenseNET Newsletter and with the Washington Association of Criminal Defense Lawyers publish Washington Criminal Defense magazine and training manuals.

Blue Ribbon Commission on Indigent Defense - A Commission sponsored by the Washington State Bar Association began meeting in May 2003 to focus on six issue areas important to public defenders, including issues that have emerged since the WDA standards were accepted by the WSBA in 1990. Emerging issues include truancy, children in need of supervision, at-risk youth, two- and three-strikes legislation, and sexually violent predators. The state bar panel plans to issue a report to the Board of Governors in Spring 2004. The group has collected data on funding and caseload levels across the state.

Washington Association of Criminal Defense Lawyers (WACDL) - As a professional association that primarily serves private criminal defense lawyers, WACDL maintains a brief bank for defenders, publishes a monthly journal, and provides attorneys with continuing legal education. Although WACDL is most involved with misdemeanor litigation, the organization often works with the WDA on issues such as clearing a criminal record and updating the evidence code.

See appendices for historical timeline of major policy and legislation.

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